

INFORMATION FOR DEBTORS' ATTORNEYS REGARDING D/B/A's & A/K/A's AND OTHER CAPTION PROBLEMS

The Fed.R.Bankr.P. and Official Forms require a debtor to include the caption of "all names used by the debtor within the last six years." Form #1 makes it clear that the caption should include trade names and d/b/a's, as well as maiden names, married names and aliases.

The Fed.R.Bankr.P. are not self-enforcing. In other words, the Clerk is not empowered to refuse to accept a petition which, in light of the debtor's statements and schedules, contains an insufficient caption. The Clerk can only refuse to accept an invalid or insufficient petition – a petition that fails to conform to certain basic provisions or rules governing filings under Title 11 U.S.C.

An invalid or insufficient petition is:

1. One that seeks to file more than one person, unless they are husband and wife;
2. One that is not signed by the debtor;
3. One that is not accompanied by a list of creditors;
4. One that is not accompanied by the filing fee or an application to pay the filing fee in installments.

This memo seeks to clarify item 1 above. The use of d/b/a's and a/k/a's and the relationship of an individual to an existing or defunct business entity or trade name can be an immense source of confusion. More important than the confusion is the potential for serious error, injuring either the debtor or his or her creditors.

As indicated above, the Clerk's office will file any petition that is a valid petition, even if it is deficient. Thus, a petition captioned "John J. Jones" is a valid petition and will be filed. The debtor could be in for trouble if he incurred debts under the names "Jonesy's Bike Shop." A Creditor who received John J. Jones' Notice of filing might not link it up with an account opened in the name of Jonesy's Bike Shop. Such a creditor might claim that it never received notice of the filing and that its debt is not discharged. The state of the law on this issue is not altogether clear, but it is certainly a ligatable issue. It probably is not materially affected by the possibility that the business name was reflected in the statement or schedules, since creditors do not receive those materials unless they ask for them – all that creditors routinely see is the case caption.

Therefore, the safe course of action for the debtor is to caption the petition "John J. Jones, d/b/a Jonesey's Bike Shop." The Clerk's office will never refuse to accept a petition like this. The Clerk's office will refuse a caption that reads, "John J. Jones, Jonesey's Bike Shop," it appears to put both John and his bike shop in bankruptcy, and if the bike shop is in fact a separate legal entity, the petition is invalid – the only joint filings permissible are husband and wife. If the debtor's attorney does not know yet whether the bike shop is a separate legal entity, he or she should find out as soon as possible. If necessary, in the meantime, "John J. Jones, d/b/a (or a/k/a) Jonesey's Bike Shop" might suffice; you can file the business separately later on if you find it is in fact a corporation or a partnership, and you can consider amending John's caption then also to more properly reflect, for example, "John J. Jones, individually and as an officer, director and shareholder of Jonesey's Bike Shop, Inc., a New York Corporation," or "John J. Jones, individually and as a general partner in Jonesey's Bike

Shop.”

I use the above references to “amending the caption” advisedly. Nothing in the Rules of Bankruptcy Procedure requires the Court to notify all creditors of an amendment. Nor can the Court administratively afford routinely to do so. Thus, the knowledge that a caption can be amended should not be relied upon as a substitute for doing a good workmanlike job before the petition is filed – once the notices have gone out, subsequent amendments might be valueless to the debtor.

Of course, the considerations reflected above are fully applicable to former business affiliations of the debtor. In this regard it is good practice to go back beyond six years if any of the debt which the debtor seeks to discharge is older than that and is incurred by his or her old business. Thus, here are some acceptable variations on the theme:

1. An old proprietorship, now defunct – “John J. Jones, formerly d/b/a Jonesey’s Bike Shop;”
2. An old partnership, now dissolved – “John J. Jones, Individually and as a former general partner in Jonesey’s Bike Shop, a general partnership.”;
3. A former officer of a still existing corporation, and partner in a still existing firm – “John J. Jones, individually (a former officer and principal of Jonesey’s Bike Shop, Inc., a New York Corporation, and a general partner in Jonesey’s Moped Shop, a general partnership);
4. A principal of a corporation that never really existed – “John J. Jones, sole owner of Jonesey’s Bike Shop, Inc.”;

...and so forth.

Of course, such d/b/a’s and other clarifying language become critical only when John is individually liable on the debts incurred or maintained in the business name, and is seeking to discharge or otherwise provide for those personal liabilities.

A final word of caution: The general public and the media unfortunately can misinterpret a case caption. If, then, the debtor has a business that is a thriving business, but he himself is in difficulty, there is no assurance that unsophisticated observers are not going to confuse the debtor with the independent going concern. This can be tragic. It can be even more tragic if, for example, someone else now owns that thriving business. Thus, be alert to the potential for insuring a going concern by having reflected it in the caption in a manner that’s less than clear. In a similar vein, many businesses have similar names. Injury can be inflicted on totally unrelated business entities by a lack of clarity, particularly in the caption. Often, this type of potential can be minimized by adding a descriptive term in the caption relating to the nature of the business. (For example, if the debtor owns Ace Enterprises, Inc., a New York Corporation engaged in the laundry business”). This should prevent confusion with the potential multitude of Ace, Inc.’s, Ace & Co., Inc., Ace Bros. Enterprises, Inc., and so forth.

Individual

John J. Jones d/b/a Jones Construction Co.

Individual operating a proprietorship

John J. Jones

Individual who within the last six years has operated a business (but not presently)

John J. Jones formerly d/b/a (f/d/b/a) Jones Construction Co.

Individuals presently a partner in a partnership

John J. Jones, individually and as a partner of J.B.C. Co., a partnership

Individual formerly (within past six years) a partner in a partnership

John J. Jones, individually and as a former partner of J.B.C. Co., a partnership.

A partnership

J.B.C. Co., a partnership comprised of John J. Jones, Richard Booth and Albert Coe, partners.

A corporation

Allsworth, Inc.

An individual presently or formerly an officer of a corporation who has listed corporate debts.

Richard Roe [“an officer” or “formerly an officer” of Allsworth, Inc.]

* Either “Inc.” or “Corp.” indicates a corporation not a partnership.